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United States Circuit Court of Appeals

For the Ninth Circuit

BANKERS DISCOUNT CORPORATION, a Corporation, and COAST SHIPBUILDING COMPANY, a Corporation,

Appellants,

vs.

STEAMSHIP "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and F. H. RANSOM, Trustee, and J. V. MASON, and UNITED SHEET METAL WORKS, a Corporation,

Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Oregon

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HOUGHTON-CARSON COMPANY, PRINTERS

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We doubt not that this court appreciates the emotions of counsel in preparing a petition for a rehearing. The burdens that ordinarily rest upon counsel's shoulders in the trial of a case in the lower court, and the presentation of it on appeal, are heavy enough, and when the appellate court, after mature deliberation,

has rendered an adverse decision, only a strong belief that the court has committed error impels the preparation and presentation of a petition for rehearing.

In the case before the court, however, we are so firmly convinced that the court's decision is based upon a misapprehension, of both the law and the facts, and that it works a great injustice upon the Bankers Discount Corporation, that we would be unquestionably recreant in our duty in not endeavoring to present those errors to the court. This we will endeavor to do as concisely and clearly as lies within our power.

The first proposition is that the court has erred with regard to its jurisdiction over this cause. The courts of the United States are courts of limited jurisdiction. The District and Circuit Courts act only by virtue of the powers granted to them by Congress, whose powers to confer jurisdiction are themselves limited by the Constitution of the United States. By the Constitution, the Federal Courts are given exclusive admiralty and maritime jurisdiction. No Federal Court sitting in admiralty may entertain any cause unless it shall appear both by the pleading and the proof that the controversy is one which comes within the admiralty jurisdiction.

The Supreme Court of the United States in the case of

BOGART vs. THE JOHN JAY, 58 U. S. 399,

lays down the rule that neither the admiralty courts of England nor of this country had any jurisdiction in questions of property between a mortgagee and the owner, and "no such jurisdiction has ever been exercised by the United States."

Until the passage of the Ship Mortgage Act of 1920, 41 Stats. at Large, 1000, the courts had not conferred any power in the matter of the foreclosure of ship mortgages upon Federal Courts sitting in admiralty, and it is clear that under this Act no jurisdiction is conferred upon the court to foreclose any mortgage unless it shall be entitled to the "preferred status" defined and prescribed by the Act itself.

Subdivision K, which is the only provision in the Act giving to the court jurisdiction of foreclosure, reads as follows:

> "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default in any term or condition of the mortgage, such lien may be forced by the mortgagee by suit in rem in admiralty. Original jurisdiction of *all such suits* is granted to the District Courts of the United States exclusively."

Subdivision L provides that in any suit in rem in admiralty for the personal enforcement of the "*preferred* mortgage lien" the court may appoint a receiver

and in its discretion authorize the operation of the mortgaged vessel, and the marshal may be authorized and directed by the court to take possession of the mortgaged vessel.

Subdivision N provides that upon default of any term or condition of a *"preferred mortgage"* upon a vessel the mortgagee, in addition to his action in rem, may bring suit in personam in admiralty for the amount of the outstanding mortgage and indebtedness or any deficiency.

It is clear from the reading of the Act that the court is without jurisdiction to foreclose a mortgage other than one entitled to the "preferred status." If a court has no jurisdiction except upon the existence of certain facts, can that lack of jurisdiction be waived, or can the court presume its existence? This question has been answered by the Supreme Court of the United States in the negative in a large number of decisions. The whole law on the subject is succinctly stated by Mr. Justice Harlan in the case of

HANFORD vs. DAVIES, 163 U. S. 273.

This was an appeal from the State of Washington wherein the Circuit Court was without jurisdiction unless the suit was one arising under the Constitution or Laws of the United States (and in the case at bar this court and the District Court of Oregon were without jurisdiction unless the controversy was one arising under that same constitution or under the laws of the

United States relating to admiralty). The court said:

> "It is true the bill alleges that the probate court in all of its proceedings acted entirely without jurisdiction and without color of authority 'save as the agent and organ of said territory.' But this allegation of want of jurisdiction in the probate court is too general and indefinite to show that its proceedings were wanting in due process of law. If the purpose was to present a case under the clause of the Constitution relating to due process of law, the grounds upon which the Federal Court can take cognizance of a suit of that character between citizens of the same state should have been clearly and distinctly stated in the bill. It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and Laws of the United States, the presumption is that a case is without its jurisdiction *unless the contrary affirmatively appears;* and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings but the averments should be positive. Brown vs. Keene, 8 Pet. 112; Grace vs. American Central Insurance Co., 109 U. S. 278, 283; and authorities cited.

These principles have been applied in cases where the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship. But

> they are equally applicable where its original jurisdiction of a suit between citizens of the same state is invoked upon the ground that the suit is one arising under the laws or Constitution of the United States. We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleadings should refer in words to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance. Ansbro vs. United States, 159 U. S. 695. * * * We adjudge that the court below properly sustained the demurrer for want of jurisdiction, and therefore did not err in dismissing the bill."

If that is the law with regard to diversity of citizenship or a controversy arising under the Constitution or laws of the United States, then it is equally true with regard to that other special jurisdiction of the Federal Courts, namely, that of admiralty and maritime controversies. If it does not appear from the pleadings that the jurisdiction of facts existed, then neither the District Court or this court can proceed to grant to the libellant Ransom the relief which he seeks.

This court has endeavored by argument and inference (a thing which the Supreme Court of the United

States says cannot be done) to confer that jurisdiction by the statement that if an exception had been filed to the libel, the libellant could have amended, and if he had amended it may be inferred that the provisions of the law had been complied with, and it would be presumed that the Collector of Customs performed all of the things which he should have done.

This statement of the court is somewhat surprising and we must confess that we have been unable to find any decision which supports it. We candidly submit that it is novel to the law. If the court is right, then a complaint which does not state facts sufficient to constitute a cause of action, a complaint or libel which does not show upon its face that the Federal Court had jurisdiction, either in law, equity, or admiralty, may be sustained because if demurrer or exception had been filed it could have been amended, and then if it had been amended the necessary facts could have been proved. If this is the law, the Federal Court can entertain an action based upon diversity of citizenship without either allegation or proof of such diversity, or allegation or proof that the amount in controversy exceeded $3000.00, and the plaintiff upon appeal could stay in court because forsooth if the defendant had demurred or had excepted, the complaint or libel could have been amended, and if it had been amended the court would presume that the evidence could and would have been offered.

It is possible that jurisprudence may some time come to a stage when neither pleadings or proof of essential and material facts need be averred or established. We are firmly convinced, however, that the present state of the law will not permit of such a liberal and convenient rule.

The court in its decision suggests that it is supported by the case of The Oconee, 280 Fed. 927, and The Owego, 292 Fed. 403. Unfortunately, however, neither of these cases are applicable to the case at bar, and do not support, but in fact deny the validity of the position adopted by this court.

The decision in the Oconee case merely holds that Subdivisions E and F do not relate to those facts which are essential to give a preferred status to a mortgage and imposes no duty upon the mortgagee, but as to the provisions of subdivisions C and D the court says "certain prerequisites are provided in the Act to be done by the mortgagor or the mortgagee or both in order that the benefits of the provision may accrue—for instance, the vessel *must be* a vessel of the United States of 200 gross tons or upward; the mortgage *must be* endorsed upon the ship's documents; it *must be* recorded as required, together with the time and date when the mortgage is so endorsed; an affidavit of good faith *must be* filed with the mortgage; there *must be* no waiver of the preferred status; and the mortgagee *must not* be an alien. In the case now under consideration it is con-

ceded that all of the requirements just named were duly complied with."

It should be noted that Judge Grier in that decision says that those things are *prerequisites* to the enforcement of the benefits of the Act. A prerequisite, according to the Oxford Dictionary, is that which is required beforehand, a condition previously necessary, and where it is used as an adjective it is "a requisite as a previous condition." In other words, the performance of those things are conditions precedent to the acquisition by the Federal Courts of jurisdiction to foreclose the mortgage.

That Judge Grier's decision is the law is clear from an examination of Subsection D (a), which says:

> "A valid mortgage * * * shall in general have, in respect to such vessel, and as of the date of the compliance with all of the provisions in this subdivision, the preferred status given by the provisions of subsection M if
>
> (1) the mortgage is endorsed upon the ship's documents;
>
> (2) is recorded as provided in subsection C;
>
> (3) an affidavit of good faith is filed with the record in the mortgage;
>
> (4) that the mortgage does not contain a waiver of the preferred status;
>
> (5) that the mortgagee is a citizen of the United States.

The only allegation in the pleading is that the trustee is a citizen of the United States, that the mortgage was executed and that it was recorded in the office of the Collector of Customs on 23rd day of March, 1921 in Book G, folio 77. The only evidence of compliance with the statute is that it was so recorded. It is of no importance whether the question of jurisdiction was raised in the court below or not. It can be raised for the first time in the Supreme Court of the United States, because it is jurisdictional. Jurisdiction cannot be conferred by agreement, and if it cannot be conferred by agreement, pleading and proof of it cannot be waived by failure to object or except. The Ship Mortgage Statute may be a liberal statute, and upon that question we offer no denial, but any law which gives a lien is a liberal law, and we know of no case where that fact has permitted a litigant to omit both pleading and proof of those things which entitle him to his lien. Let it be remembered that unless those facts exist he has no lien, preferred or otherwise, and this is strongly impressive when it is remembered that an admiralty court has no jurisdiction to foreclose a ship mortgage unless it is entitled to a preferred status.

Now, let us discuss the Owego case, 292 Fed. 403. An objection was made to the recognition of the mortgage of the New York Trust Co. It does not appear from the decision upon what the objector relied. All the court says upon this subject is: "the object of that statute was to enable the owners of vessels to use the vast capital invested in them with at least a part of the

facility enjoyed by investors in structures on land. But we note the statute is liberal and should be liberally construed, *although all of its provisions as to registry and endorsement on the ships' documents should be complied with.*"

There is no intimation in this decision that a mortgagee, who has not seen to it that the things are done which the statute says must be done in order to give him a preferred status, is entitled to that different status even though he has neither pleaded nor proved a compliance with the statute.

The court evidently lost sight of the fact that the Bankers Discount Corporation does not and never has stood, with regard to the other owners of the ship or the trustee, in the position of the Coast Shipbuilding Company. Long prior to the time that the mortgage to Ransom, Trustee, was discussed among the shareholders, long prior to the time that any mortgage was ever executed or any money loaned, the Bankers Discount Corporation was the owner of the claim of the Coast Shipbuilding Company against the ship. Its loan was made upon the faith of such claim, upon the agreement that the same belonged to it, and that a formal assignment should be made to it as soon as the amount could be ascertained after an adjustment of the Emergency Fleet Corporation. The Coast Shipbuilding Company had no lien to waive, because it belonged to the Bankers Discount Corporation. That arrangement was made during the lifetime of Mr. Harry Pennell.

A formal assignment could not then be executed because the exact amount of the overage could not be ascertained.

The court has again lost sight of the fact that the equities of the case are strongly in favor of the Bankers Discount Corporation. It was their money which enabled the owners of the ship to finish its reconstruction and alteration. It was their $10,000 which paid the seamen's wages when the ship returned from Australia. It was their money which paid the insurance premiums. All of the shareholders, including those for whom Frank Ransom acted as trustee, were liable for the amount of the Coast Shipbuilding lien. Gallatin vs. The Pilot, 9 Fed. Cases, pp. 1100, 1102.

Again the court is in error in deciding that there was a ratification of the waiver by the Coast Shipbuilding Company. The court says "it may be conceded that Green, as secretary and managing officer of the Coast Shipbuilding Company had good authority to waive the company's lien, but the decision of the question here involved does not rest upon the inquiry into the limits of Green's power. The evidence leaves no doubt that the corporation was in *absolute need of money. Many efforts had been made to raise it. An attempt had been made to borrow it from a bank as a first mortgage on the ship.*"

The court is under a misapprehension as to the facts. It was not *the corporation* which was in absolute

need of money, *but the ship.* No efforts had been made to raise money for the corporation, but efforts had been made to raise money for the ship. No attempt had been made to borrow money from a bank on a first mortgage on the ship for the benefit of the corporation, but an effort had been made to raise the money from a bank by means of a mortgage on the ship for the benefit of the ship. We will freely concede that if the $35,000 was a loan to the Coast Shipbuilding Company for its benefit, then the acceptance of the money by the Coast Shipbuilding Company would be an absolute ratification of the waiver by Green. Where, however, the actions of Green were for the ship and not for his corporation, there can be no ratification or estoppel as to the corporation, nor does the fact that Sherwood may have been present at the meeting of the shareholders bind the corporation. As was pointed out, a corporation acts only through an action of its Board of Directors, and even the Board of Directors cannot dispose of or give away the assets of the corporation except upon consideration passing to the corporation.

The action of Green was not for the benefit of his corporation but was against its interests. When the ship returned from its Australian trip it was to the interest of the Coast Shipbuilding Company to have insisted upon the payment of its lien, and if such payment was refused, to have foreclosed it. By foreclosure it would have obtained title to a ship which cost approximately $400,000 for a lien of approximately $50,000.00. Mr. Green foregoing his duty to this corpora-

tion and in the interest of the other owners of the ship may have attempted to waive the corporation's lien, but he was without authority. He acted against the interests of the corporation. The corporation received no benefits, did not receive any portion of the $35,000.00 which went into the coffers of the ship, and not to the benefit of the shipbuilding company.

Again, we urge, inasmuch as Ransom stands simply as a trustee for certain owners of the ship who advanced money for the ship, and therefore for their own benefit, that such a situation can not give rise to a maritime lien, or in fact any kind of a lien. The Gyda, 235 Fed. 266; The Cimbria, 250 Fed. 271.

In this case we have the Bankers Discount Corporation loaning money to the Coast Shipbuilding Company. It was in fact used by that company in making the alterations and repairs which enabled The Egeria to go to sea and in paying her seamen and insurance premiums upon her hull, engines and tackle. This money was loaned to the Coast Shipbuilding Company for the benefit of the vessel and an assignment of its lien given to the Bankers Discount Corporation as security for the loan. The money which the Bankers Discount Corporation now attempts to obtain is money which the shareowners of the ship received the benefits of, and without which the ship could not have gone to sea. After having received the benefits of that money some of the shareowners claim to have advanced moneys *to themselves* and *to have taken security upon their*

own property, and insist that their loan to themselves, secured upon their own property, is a lien prior to that of a stranger which had no interest in the ship. This is contrary to all rules of admiralty, as is shown in the cases last above cited.

Whether a part owner can, under any circumstances, obtain a maritime lien against his own property is not settled, the authorities being in conflict, but it is clear, on principle as well as upon authority, as against a stranger having a maritime lien, no such lien can be enforced by one who is part owner himself for the debt underlying such lien. Petrie vs. Steam Tug Coal Bluff, 3 Fed. 531; Benton, 3 Fed. Cases, 256, No. 1334.

The court erred upon the question of jurisdiction. The court erred upon the question of ratification. The court erred upon the fact as to the corporation being in need of money and obtaining any portion of the money. The court erred upon its construction of the statute. By these errors it is permitting shareowners or partners to prefer themselves as against other creditors.

A rehearing should be granted, and the errors above referred to corrected.

Respectfully submitted,

WINTER & MAGUIRE,
Proctors for Bankers Discount Corporation
and Coast Shipbuilding Company.